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Supreme Court of the United States

OCTOBER TERM, 1950

342 U.S.
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ALA-A

No. 140

ALABAMA MARBLE COMPANY, a Corporation,

Petitioner,

versus

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Fifth Circuit.

JOHN J. SMITH,
Birmingham, Alabama,
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SUPREME COURT OF THE UNITED STATES
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PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals
for the Fifth Circuit.

To the Honorable, the Chief Justice, Fred M. Vinson, and Associate Justices of the Supreme Court of the United States:

MAY IT PLEASE THE COURT:

1.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

1. Petitioner, an Alabama corporation having its principal office and place of business at Gantt's

Quarry, Alabama, has been and is now engaged in the marble and marble by-products business. Petitioner admits that, at all times pertinent, it was engaged in commerce and that its business affected commerce within the meaning of the NATIONAL LABOR RELATIONS ACT, as amended (61 Stat. 136, 29 U. S. C., *Supp. III*, Secs. 151 *et seq.)*, herein referred to as the Act. (Also, see R.[1] 33-34, 56, 139-140.)

2. For more than forty (40) years, without interruption, petitioner has conducted its business at Gantt's Quarry, Alabama. (ABR.[2] 166-167.) There has been no "anti-union animus" (*International Union, U. A. W., A. F. L., Local 232 v. Wisconsin Employment Relations Board, et al.*, 1949, 69 Sup. Ct. 516) on the part of the petitioner.

On October 4, 1946, the National Labor Relations Board (herein called "Board") certified the American Federation of Labor as the collective bargaining agent for all of petitioner's employees, including watchmen, but excluding office and clerical employees, draftsmen, executives and supervisory employees. (*In the Matter of Alabama Marble Company, Employer, and American Federation of Labor, Petitioner*, 1946, 71 N. L. R. B. 275, No. 31.) Following such certification petitioner and International Association of Marble, Slate and Stone Polishers, Rubbers and Sawyers, Tile and Marble Setters Helpers, and

[1] R. is used to designate the certified TRANSCRIPT OF RECORD filed herein.
[2] ABR. is used to designate the certified APPENDIX TO BRIEF FOR RESPONDENT filed herein.

Terrazzo Workers Helpers, A. F. L., Local 133, (said Unions, separately and severally, herein called "Union") negotiated and signed a collective bargaining agreement (herein called "contract") effective during the period from November 7, 1946, through November 7, 1947, "and thereafter from year to year until either party shall give to the other party 30 days written notice prior to any anniversary day of this agreement for a desire of change or termination." Petitioner instructed its foremen to comply with the provisions of the contract (ABR. 106). From time to time petitioner's representatives met with representatives of the Union, considered, adjusted and settled all grievances (ABR. 29, 30, 60, 77-78). As found by the Trial Examiner: "The respondent (petitioner here), as of October (1947), had not committed any unfair labor practice." (R. 149.)

3. The contract between petitioner and Union was effective at all times pertinent. (R. 210-214.) Expressly (Section 1. A., ABR. 211) petitioner was "vested exclusively with the management of the business, including the right to . . . discipline, and discharge for just cause." The contract required reinstatement without loss of seniority and with full pay for time lost in the case of any employee unjustly discharged. (Article 5E, ABR. 214.) Lock-outs, slowdowns and work-stoppages were precluded "until after *all* the provisions of the grievance procedure have been complied with." (Section 1 C, ABR. 211-212.) A specific procedure was established for the handling of grievances (Article 5, ABR. 212-214)

which required arbitration (Sec. 4, ABR. 213) and made final and binding on petitioner and Union the decision of the arbitrators. Also, such grievance procedure provided for monthly meetings (Article 5 C, ABR. 213), required petitioner to pay Grievance Committeemen for time spent during their regular working hours attending meetings and required members of the Grievance Committee to get certain permission before leaving their departments to go to any other department to handle a grievance. (Article 5 D, ABR. 213-214.)

4. During the effective period of the contract, that is, on June 23, 1947, the *LABOR MANAGEMENT RELATIONS ACT, 1947,* (61 Stat. 136, 29 U. S. C., *Supp. III,* Secs. 141 *et seq.*, 29 U. S. C. A., Pocket Part, *Secs.* 141 *et seq.)* was enacted. It amended the *NATIONAL LABOR RELATIONS ACT.*

Petitioner and Union desired to change the contract. On September 2, 1947, the petitioner sent the Union notice that it did not wish the contract to continue beyond its expiration date. Copies of this letter were sent to the Board and Federal Mediation and Conciliation Service. On September 7, 1947, the Union sent the petitioner a notice giving the required sixty (60) day notice of its intention to reopen the contract. On October 2, 1947, the petitioner sent notice to the Federal Mediation and Conciliation Service that no agreement had yet been reached as to the provisions of a new contract. On October 6, 1947, the Union sent a similar notice to the Federal Mediation and

Conciliation Service. (R. 154, ABR. 99, 100, 107-112.) Thus both petitioner and Union gave the notices required by Section 8 (d) of the Act.

5. The first work stoppage in petitioner's history (ABR. 28, 166, 167) occurred on Friday, October 3, 1947, when nine (9) handpolishers, without permission, absented themselves from work during the afternoon work period to listen to a radio broadcast of a World Series baseball game. (ABR. 168-173.) The nine (9) handpolishers were *not summarily* disciplined. This incident was investigated over a three day period by petitioner's Assistant General Manager, H. M. King, after it became known to him. King was in charge of production and production personnel. (ABR. 194.) Having considered the information obtained, King reached a decision, namely, to discharge *anyone* who had wilfully absented himself from work without permission during the afternoon work period on Friday, October 3, 1947. King sent his decision to all production foremen and the nine (9) handpolishers were discharged when they reported for work on Monday, October 6, 1947.

Petitioner's business was and is departmentalized. Particular foremen were in charge of particular departments and only had authority over employees in the particular departments over which they were foremen. (ABR. 212-214, which recites Article 5 of the contract.) Petitioner's foremen "could on their own responsibility fire a man for insubordination, that is, flatly refusing to obey orders, and then in the

case of a foreman being cursed out by a man under him." (ABR. 200, 201-202.) King handled all other matters requiring disciplinary action. Such was the known custom and practice. (ABR. 200, 201-202, R. 272-284.)

The discharges of the nine (9) handpolishers were handled according to the contract grievance procedure at meetings on October 11, 1947, and October 15, 1947. During the meeting on October 15, 1947, petitioner offered to return eight (8) of the handpolishers to work the next day without loss of seniority, offered to pay one (1) handpolisher (Teel) for working time lost, and refused to rehire one (1) handpolisher, namely, Aubrey Ellison. (ABR. 88-92, 150-156, 180-182, 189-193.) As requested by the Union, the petitioner reduced its position to writing (ABR. 215-220). The Union refused petitioner's proposal and the parties agree to arbitrate these grievances. Petitioner was ready, able, and willing, at all times, to arbitrate these matters but such was precluded by the Union. (R. 148, footnote 7, insofar as findings of fact are stated.)

6. On Monday, October 6, 1947, the nine (9) handpolishers were discharged when they reported for work. (ABR. 172-173.) A complete work stoppage in petitioner's production operations (quarry, mill, crusher, finishing plant) occurred on and lasted throughout Monday, October 6, 1947. (R. 144.) King learned of the work stoppage about 7:45 A. M. when Harrison, a son of one of petitioner's officers and

a non-supervisory employee, (ABR. 175), came to his home and told him that none of the men in the finishing plant were at work except those at the rubbing beds, that men were massing around those working on the rubbing beds (Negroes—ABR. 130) and that there might be trouble. King told Harrison "to go back and tell E. I. Dison, foreman of the rubbing beds, to shut the beds down." (R. 144, ABR. 173-175.) King was available throughout the day but did not go to the production area. (R. 144, ABR. 174.) There is no dispute about the fact that King was petitioner's representative to whom all grievances had been and were to be presented. (ABR. 29-30, 77-78, 102-103.) The custom and practice was to contact King and arrange for a meeting. (ABR. 77-78.) The Union admitted that it should have contacted King, but did not. (ABR. 33, 102-103.) King's assistant, W. H. Runge, Jr., (ABR. 136) was out of town on business. (ABR. 177.) Also, W. H. Runge, Sr., petitioner's General Manager, was out of town on business. (ABR. 177.) Mitchell, an A. F. of L. organizer and a representative of the Union, stated that he was sorry the work stoppage had occurred, that he did not then know the circumstances or details, had made no investigation, that the strike had not been authorized by the Union, that the Union would live up to its contract and order the men back to work. (ABR. 86.) King told Mitchell that he resented the whole affair, that the men had acted in cold disregard of the welfare and interest of the petitioner, that their acts were those of gross insubordination, that they had defied the petitioner, that they had violated the contract.

(ABR. 178.) Mitchell then proposed that all employees, including the nine (9) discharged handpolishers, should return to work the next morning, that the discharge of the nine (9) handpolishers should be handled as grievances under the contract, that the handpolishers, if found guilty under the grievance procedure, could then be fired by petitioner, which would have the advantage of their services in the meantime. Also, Mitchell reminded King that the contract provided that a discharged employee returned to work would be entitled to back pay for work time lost. (ABR. 87.) King *told* Mitchell that everyone except the nine (9) discharged handpolishers could return to work the next morning. (ABR. 178.) It was then agreed that the cases of the nine discharged handpolishers would be handled as grievances under the provisions of the contract. (ABR. 178, 179.) The next morning, Tuesday, October 8, 1947, petitioner's employees, except the nine discharged handpolishers, returned to work.

After the complete work stoppage on October 6, 1947, King's time and thought were taken up with the details of arranging the work and getting the plant back into production. (ABR. 203.) During the latter part of the week of October 6, 1947, King received his first specific information regarding the role or part taken by any individual employee in connection with the complete work stoppage on Monday, October 6, 1947. (ABR. 183.) King completed his investigation on October 14, 1947. On October 15, 1947, because of the newness, seriousness and importance

of the decision to be made in connection with those responsible for the work stoppage on Friday afternoon, October 3, 1947, and the complete work stoppage on Monday, October 6, 1947, he met with petitioner's directors and together they reviewed the cases of the nine discharged handpolishers and the cases of the four individuals who filed charges against petitioner with the National Labor Relations Board, namely, Charles T. Adair, (Case No. 10-CA-86, R. 13-15), W. A. Wilson, (Case No. 10-CA-87, R. 16-17), W. A. Adams, (Case No. 10-CA-88, R. 18-19), C. M. Kinser, (Case No. 10-CA-93, R. 20-22). Collectively the directors reached a decision. (ABR. 182-190, 195-199, 202-204, 205-207, 223-227, 136-144.) Petitioner's decision regarding the nine discharged handpolishers has already been stated. (See paragraph 5 hereinabove.) Petitioner's decision was to discharge the said Charles T. Adair, W. A. Wilson, W. A. Adams and C. M. Kinser, and each was discharged on Thursday, October 16, 1947, after each had worked seven (7) days (ABR. 82, 181), for causing or provoking the complete work stoppage in petitioner's production operations on Monday morning, October 6, 1947, in disregard of the welfare of fellow workers and interest of petitioner and in violation of the contract between petitioner and the Union. (R. 146.) At the evening meeting with representatives of the Union on October 15, 1947, King told the Union that Ellison's behavior "does warrant us in discharging him." (ABR. 157-158.) Petitioner treated and considered Adair, Wilson, Adams and Kinser in the same category as Ellison and believed that their misconduct warranted petitioner in dis-

charging them. (ABR. 158.) Union representative Mitchell during the meeting on October 22, 1947, stated that Adair, Wilson, Adams and Kinser "were discharged because they did not agree with Mr. Smith and with the company on its proposal to reinstate part of the nine handpolishers and leave one out." (ABR. 95.)

As found by the Trial Examiner Adair, Wilson, Adams and Kinser held positions in the Union. Kinser was its president, Adair was secretary and treasurer, and Wilson and Adams were committeemen. (R. 141.) Other committemen, namely, Joe Kirk and Douglas Robinson, were not discharged. (ABR. 78.) The particular willful misconduct of Adair, Wilson, Adams and Kinser is detailed in RESPONDENT'S STATEMENT OF CITATION FROM THE RECORD filed with the Board and is undisputed by the Board. (R. 244-246, which by reference are incorporated herein as though set out verbatim.) Petitioner posted a statement setting forth the facts regarding the nine (9) discharged handpolishers and the said Charles T. Adair, W. A. Wilson, W. A. Adams and C. M. Kinser. (ABR. 227-230.)

The discharges of Adair, Wilson, Adams and Kinser were handled as grievances under the contract at the meeting held on October 22, 1947. (ABR. 104.) Petitioner and Union waived technical compliance with steps 1 and 2 of the grievance procedure (ABR. 164) contained in the contract. Petitioner and Union then prepared written statements naming their respective

arbitrators and exchanged these statements. (ABR. 97-98.) The Union failed, refused, or precluded the arbitration of the cases of Adair, Wilson, Adams and Kinser, even though it was called upon several times by the petitioner to proceed. (ABR. 161-165, 104-105.)

7. On the basis of the charges filed by Adair, Wilson, Adams and Kinser (R. 13-22), the Board issued a complaint, dated March 24, 1948, against the petitioner, alleging that petitioner had engaged in and was engaged in unfair labor practices affecting commerce within the meaning of Section 8 (a) (1) and (3) and Section 2 (6) and (7) of the Act, as amended (R. 22-26), and on the same date issued an order consolidating the cases of these four (4) individuals for hearing. (R. 26-27.)

On May 25, 1948, the Board issued a complaint against petitioner (R. 32-40) based on a charge (R. 47-49) dated February 6, 1948, and an amended charge (R. 29-32) dated March 3, 1948, signed by Walter L. Mitchell, organizer, A. F. of L., before a Board agent, alleging that petitioner had refused to bargain with the Union commencing on or about September 6, 1947, had provoked (R. 35-38) an unfair labor practice strike commencing on or about November 8, 1947, (R. 36-38), had discriminated against John T. Stewart and Rex Gordon Stewart by refusing to rehire each of them following the alleged unfair labor practice strike which began on November 8, 1947, and lasted until December 12, 1947, because of their membership in and activities on behalf of the Union

and because they engaged in concerted activities with other employees for the purpose of collective bargaining and other mutual aid and protection. (R. 37.) Each of these matters was decided in favor of the petitioner (Intermediate Report, R. 135-221 and Board's decision and order dated June 6, 1949, R. 125-134) and are not now before the Court. However, the following statement, finding or conclusion was made by the Trial Examiner and concurred in by the Board: "While Union leaders were discharged, the circumstances under which they were released do not indicate that respondent was motivated by a desire to weaken the Union's position at the bargaining table, to destroy its majority, or to avoid the respondent's obligation to bargain." (R. 173.)

Petitioner bargained with the Union at meetings held on the following dates in 1947, namely, September 17, September 26, October 22, October 30, November 6, November 28, and December 23. (R. 154-155.)

On May 26, 1948, an order was issued consolidating the cases of the individual complainants with that based on the charge filed by the Union. (R. 41-42.) Petitioner filed a motion to sever the cases of the individual complainants (R. 52-53) and a separate motion to dismiss each such case (R. 50-51), and a separate motion to strike from each such cases paragraph 4 (R. 60-65) of the complaint based on the charges of the four individual complainants. Petitioner through its answers challenged the Union's compliance with Section 9 (f), (g) and (h) of the

Labor Management Relations Act, 1947, and demanded strict proof thereof. The Court's attention is called to the fact that the record contains nothing to show that the Union had complied with such provisions. Petitioner further alleged the discharge of Adair, Wilson, Adams and Kinser had been handled as a grievance under steps 1, 2 and 3 of the grievance procedure, that petitioner and Union had agreed to arbitrate such matters and had designated their respective arbitrators, that the discharges of the four said individuals were not arbitrated, because of the refusal, neglect or failure of the Union to proceed. Also, petitioner answered that each individual complainant (Adair, Wilson, Adams and Kinser) was promptly discharged for good cause after petitioner had knowledge of the particular conduct of each such individual complainant and had satisfied itself as to the guilt of each such individual complainant. (R. 62.) Petitioner answered that it was engaged in commerce but averred that it was without knowledge regarding the averment that such had a close, intimate relation to commerce. (R. 63.)

Petitioner filed a motion to dismiss the complaint in Case No. 10-CA-85. (R. 81-83.) Also, petitioner filed a motion to sever (R. 78-81) Cases No. 10-CA-86 (Adair), 10-CA-87 (Wilson), 10-CA-88 (Adams), 10-CA-93 (Kinser), and 10-CA-85 (Union). Then petitioner filed its answer to the complaint issued in Case No. 10-CA-185, which was issued because of the aforesaid charge and amended charge filed by the Union.

(R. 66-76.) Petitioner answered that it was engaged in commerce, challenged the Union's compliance with Section 9 (f), (g) and (h) of the Labor Management Relations Act of 1947, and demanded strict proof thereof, that the discharges of Adair, Wilson Adams and Kinser had not been handled under the grievance procedure through arbitration as provided in the contract because of the refusal, neglect or failure of the Union to proceed, that it had promptly discharged Adair, Wilson, Adams and Kinser for good cause after it had knowledge of their respective conduct on October 6, 1947, and had satisfied itself as to the guilt of each such person, challenged the averment that the Union represented its employees for the purpose of collective bargaining and averred that it had received from the Board "a petition for decertification of representatives" (N. L. R. B., Atlanta, Georgia, No. 10-RD-5), that it had filed with the Board, at Atlanta, Georgia, its petition for the "certification of represenatives", averred facts showing that it had bargained collectively, denied the allegations that it had caused and prolonged an unfair labor practice strike, averred that John T. Stewart was a supervisory employee within the meaning of the Act, that petitioner had no need for the services of Rex Gordon Stewart, denied any unfair labor practices in connection with any of its employees. At the close of the hearing petitioner again moved to dismiss the complaint in each case. (R. 139.)

Each of petitioner's aforesaid motions were overruled by the Trial Examiner. The complaint based

on the charges of the four individual complainants and the complaint based on the charges filed by the Union were consolidated for hearing and heard together by a Trial Examiner of the Board during the period beginning June 8, 1948, and ending June 25, 1948. (R. 138.)

8. The Trial Examiner found and concluded that petitioner had violated Section 8 (a) (1) and (3) of the Act and recommended that petitioner cease and desist therefrom, that petitioner reinstate and make whole Charles T. Adair, W. A. Wilson, W. A. Adams, C. M. Kinser, and post for 60 days a notice to its employees. (R. 135-221.) Petitioner was absolved of all other charges of unfair labor practices. (R. 184-188.)

The Trial Examiner concluded that the work stoppage on October 6, 1947, was directed by Union leaders and supported by Union members, constituted concerted activities within the Act and subjected the participants therein and their leaders to disciplinary action because it was in violation of a contractual obligation. (R. 148-149.) Further, the Trial Examiner conculded that the employee status of the strikers was not automatically severed but that affirmative and timely action by the petitioner was required. Also, the Trial Examiner held that "the agreement (on October 6, 1947) that all strikers could return to work constituted a disposition of the matter of disciplining the strikers for their strike activity" (R. 151), that such agreement "plus the actual return to work, in-

cluding the four complainants, the failure to . . . to initiate any action for several days and . . . failure to take final action against the four former strikers until 10 days after the work stoppage, all constituted condonation of their strike activities," (R. 151) that petitioner "was under an obligaion to take affirmative action against any strikers, or at least, effectively reserve that right," (R. 151.) Then the Trial Examiner said:

> "The use of the method of discharges as a penalty for engaging in activity protected under the Act has been recognized as a discrimination which 'goes to the very heart of the Act.' The scope of the illegal conduct discloses a purpose to defeat self organization among the employees. Such conduct reflects a determination generally to interfere with, restrain and coerce the employees in the exercise of the right of self-organization, to form, to join or assist labor organizations, to bargain collectively through representatives of their own choosing and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection and presents a ready and effective means of destroying self-organization among the employees." (R. 183-184.)

9. Petitioner duly filed with the Board its exceptions to the findings, conclusions, rulings, decisions and recommendations of the Trial Examiner, (R. 103-124) and a brief in support thereof. Also, petitioner requested oral argument before the Board and this request was denied. (R. 126, footnote 1.) Counsel for the General Counsel filed exceptions to the said INTERMEDIATE REPORT (R. 98-102) and a brief in support thereof.

10. On June 6, 1949, the Board issued its DECISION AND ORDER (R. 125-134), affirming the rulings of the Trial Examiner. The Board further held that petitioner "waived or condoned such conduct (that of Adair, Wilson, Adams, Kinser in connection with the work stoppage on October 6, 1947) by permitting them to return to work." (R. 126, 127); that petitioner knew that the employees had engaged in a work stoppage in breach of contract, yet "agreed to permit all employees to return to work without stipulating that it reserved to itself the privilege of disciplining any participant in the work stoppage." (R. 127.) Also, the Board held:

> "In any event, the Respondent's foremen had personal knowledge of the part played by the four union officers in the work stoppage at the time it occurred, and we attribute such knowledge to the Respondent." (R. 127.)

Further the Board held:

> "We further find that Respondent discharged these four employees and failed and refused to reinstate them because of their concerted activities, thereby interfering with, coercing, and restraining the employees in the exercise of the rights guaranteed by Section 7 of the Act, in violation of Section 8 (a) (1) thereof. Whether the Respondent's discriminatory conduct be viewed as violative of Section 8 (a) (3) or Section 8 (a) (1), effectuation of the policies of the Act requires that the four employees be reinstated with back pay." (R. 127.)

11. Petitioner next filed its MOTION OR PETITION FOR RECONSIDERATION, ETC. (R. 221-232) each and every part of which is now referred to and incorporated herein, with the same force and effect as if herein set out in full. Again petitioner, for substantial reasons, petitioned the Board for permission to argue orally its MOTION OR PETITION FOR RECONSIDERATION, ETC. (R. 233-235.) Each and every ground in said petition for oral argument is now referred to and incorporated herein, with the same force and effect as if herein set out in full.

By order dated July 20, 1949, the Board ordered the petitioner to supply a statement of citations from the record in the case (R. 236-237), and petitioner complied. (R. 241-251.) Petitioner now refers to each and every numbered item in its STATEMENT OF CITATION FROM THE RECORD and incorporates each herein, with the same force and effect as if herein set out in full.

On August 26, 1949, the Board entered its order (R. 252-257) denying petitioner's MOTION OR PETITION FOR RECONSIDERATION and petitioner's REQUEST FOR PERMISSION TO ARGUE ORALLY, ETC. The petitioner then filed its MOTION TO SET ASIDE OR VACATE THE ORDER DENYING PETITION FOR RECONSIDERATION OF BOARD'S DECISION AND TO REOPEN, ETC., which was supported by six affidavits (R. 258-267, 272-284), and a separate MOTION TO REOPEN AND SET FOR FURTHER HEARING, which, also, was supported by six

affidavits (R. 267-284), and petitioner now refers to each of these said motions and incorporates each herein, with the same force and effect as if herein set out in full. On October 21, 1949, the Board entered an order denying these motions (R. 285-286).

12. Petitioner's exceptions filed to the INTERMEDIATE REPORT and its aforesaid motions filed in connection with the order of the Board dated June 6, 1949, and its STATEMENT OF CITATION FROM THE RECORD challenge all findings of fact, conclusions of law, recommendations, decisions or rulings of the Trial Examiner and the Board as being contrary to the preponderance or substantial evidence on the record considered as a whole and contrary to the policy and express provisions of the Act, and contrary to the applicable law.

13. On February 3, 1950, the Board filed in the United States Court of Appeals for the Fifth Circuit its petition for enforcement against the petitioner herein of its aforesaid order dated June 6, 1949. (R. 1-7.) On the same date the Court ordered the Board's petition filed and the case docketed as of February 3, 1950, and, further ordered that the petitioner, respondent below, be given notice upon the filing by the Board of a certified copy of the transcript of the proceedings in said matters. (R. 8-9.) On February 3, 1950, the Board duly filed a certified transcript of the record of the proceeding had before the Board. (R. 9-13.) In the United States Court of Appeals for the Fifth Circuit the cause was docketed as N. L. R. B.,

Petitioner, *versus* ALABAMA MARBLE COMPANY, Respondent, NO. 13111.

On January 8, 1951, said cause was argued and submitted to the Court, Circuit Judges E. R. Holmes, Wayne G. Borah, Robert L. Russell, sitting. (R. 287.)

On January 16, 1951, Alabama Marble Company filed a supplemental brief in order to make certain additional comments to the Court which it was impossible to make within the twenty (20) minutes allotted by the Court for argument. On January 22, 1951, a *per curiam* opinion was entered granting the Board's petition to enforce its order dated June 6, 1949, against Alabama Marble Company, respondent below and petitioner herein. (R. 287.) The judgment of the United States Court of Appeals for the Fifth Circuit was entered on January 22, 1951, and the pertinent language therein contained is:

> "It is now here ordered, adjudged and decreed by this Court that the petition to enforce the order of the said National Labor Relations Board in this cause be, and the same is hereby granted." (R. 288.)

This judgment of the United States Court of Appeals for the Fifth Circuit is reported in 185 F. 2d. 1022.

On February 9, 1951, Alabama Marble Company, respondent below and petitioner herein, filed a PETITION FOR REHEARING and, in the alternative, a MOTION TO AMEND JUDGMENT. (R. 289-297.) Each and every ground in said PETITION FOR REHEARING is now referred to and incorporated herein,

with the same force and effect as if herein set out in full. Said PETITION FOR REHEARING was opposed by the Board. (R. 299-300.)

On February 15, 1951, Alabama Marble Company, the petitioner herein, and respondent below, filed a MOTION FOR HEARING *EN BANC* on the ground that the *per curiam* judgment entered in said cause No. 13111 on January 22, 1951, is directly contrary to and overrules the decision of the same Court, namely, United States Court of Appeals for the Fifth Circuit, in *N. L. R. B. v. Dorsey Trailers, Inc.*, 179 F. 2d. 589. (R. 298-299.) On February 17, 1951, petitioner herein and respondent below, filed a brief in support of its said MOTION FOR HEARING *EN BANC*. The Board opposed the said MOTION FOR HEARING *EN BANC*. (R. 300-301.) On March 9, 1951, petitioner herein then filed a reply brief to Board's statement in opposition to petitioners said MOTION FOR HEARING *EN BANC*.

On May 4, 1951, the Court below entered the following order:

> "It is ordered by the Court that the Petition for Rehearing in this cause, be, and the same is hereby denied." (R. 301.)

On May 25, 1951, the Court below entered its decree enforcing the Board's order of June 6, 1949, against the petitioner herein. (R. 301-304.) Also, on May 25, 1951, the petitioner herein presented to the Court below its motion for an order staying the execution of the

Court's decree entered on May 25, 1951, in order that petitioner might apply to this Court for a writ of certiorari. On May 25, 1951, the Court below entered its order staying the execution of its said decree entered on May 25, 1951, for a period of thirty (30) days pending an application to the Supreme Court for a write of certiorari. (R. 305.)

2.

BASIS FOR THIS COURT'S JURISDICTION.

The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254 (1) (28 U. S. C. A., Section 1254 (1).) and Section 10 (e) of the NATIONAL LABOR RELATIONS ACT, as amended (29 U. S. C. Section 160 (e), 29 U. S. C. A., Pocket Part Section 160 (e).).

3.

QUESTIONS PRESENTED.

1. Whether the work stoppage on Monday, October 6, 1947, constituted federally protected concerted activities within the meaning of Section 7 of the Act.

2. Whether the work stoppage on Monday, October 6, 1947, which was in violation of the no strike provision contained in the existing collective bargaining agreement and which occurred within the sixty day period provided in Section 8 (d) of the Act after the employer and Union had exchanged the

notices required by Section 8 (d) of the Act, constituted a violation of Section 8 (b) (3) of the Act.

3. Whether there is a conflict between Section 2 (3) and Section 8 (d) of the Act as to the status of an employee.

4. Under Section 8 (d) of the Act what constitutes reemployment of a striking employee.

5. On Monday, October 6, 1947, there was a complete work stoppage in petitioner's production operation. The existing collective bargaining agreement precluded a lock-out. Petitioner and Union had exchanged the notices required by Section 8 (d) of the Act. Was petitioner under a duty because of Section 8 (d) not to discharge all of its employees.

6. Because of the work stoppage on Monday, October 6, 1947, could petitioner have then and there discharged or suspended all of its employees without violating the Act.

7. Did Union's failure or refusal to arbitrate the discharge of Adair, Wilson, Adams and Kinser, as provided in the grievance procedure contained in the existing collective bargaining agreement, constitute a violation of Section 8 (d) or 8 (b) (3) of the Act.

8. Whether as a matter of law or from the evidence on the record considered as a whole there is any basis for finding, concluding, holding or decreeing that

petitioner violated Section 8 (a) (3) of the Act by discharging Adair, Wilson, Adams and Kinser in view of the following, which constitutes all that is contained in the record regarding petitioner's "anti-union animus" or improper motivation:

(a) "The respondent (petitioner here) as of October 6 (1947) had not committed any unfair labor practice." (INTERMEDIATE REPORT, R. 149.)

(b) "While the Union leaders were discharged, the circumstances under which they were released do not indicate that respondent was motivated by a desire to weaken the Union's position at the bargaining table, *to destroy its majority*, or to avoid the respondent's obligation to bargain." (Emphasis added.) (INTERMEDIATE REPORT, R. 173.)

(c) Union representative Walter L. Michell stated that Adair, Wilson, Adams and Kinser "were discharged because they did not agree with Mr. Smith and with the company on its proposal to reinstate part of the nine handpolishers and leave one out." (ABR. 95.)

(d) Petitioner treated and considered Adair, Wilson, Adams and Kinser in the same category as Ellison, the discharged handpolisher not permitted to return to work, and believed that their misconduct warranted petitioner in discharging them. (ABR. 158.)

(e) Other Union officers, namely, Joe Kirk and Douglas Robinson, were not discharged by the petitioner. (ABR. 78.)

9. Did the no strike provision in the existing collective bargaining agreement constitute a waiver of the right to strike violative of Section 13 of the Act.

10. Were the strikers reemployed within the meaning of Section 8 (d) the Act when petitioner's representative at the evening meeting with representatives of the Union on Monday, October 6, 1947, the day of the complete work stoppage, said that all could return to work the next day, except the nine discharged handpolishers.

11. Was there any legal consideration for the strikers returning to work on Tuesday, October 7, 1947.

12. Did petitioner have a legal right to expect its employees to return to work because of Section 8 (d) of the Act.

13. Should petitioner's MOTION TO DISMISS the complaint in Case No. 10-CA-185 based on charges filed by the Union, made at the close of the hearing, (R. 139) have been sustained because no evidence was offered to show that Union had complied with Sections 9 (f), (g) and (h) of the Act.

14. (a) Under the circumstances, did the mere statement by petitioner's Assistant General Manager, during the evening meeting with Union representatives on the day of the complete work stoppage, Monday, October 6, 1947, that all could return, except the nine discharged handpolishers, constitute a condonation of the activities of all strikers, including the

four individual complainants, Adair, Wilson, Adams and Kinser.

(b) Under the circumstances did such statement constitute a waiver and preclude petitioner from taking disciplinary action at a later date after there had been an investigation and petitioner had satisfied itself as to the guilt of Adair, Wilson, Adams and Kinser.

(c) At the time petitioner made such statement was it under a legal duty to reserve to itself the privilege of disciplining any participant in the work stoppage in order to later discipline without incurring the sanctions of the Act.

15. Did petitioner waive or condone the unlawful and improper conduct of Adair, Wilson, Adams, Kinser by permitting them to return to work on Tuesday, October 7, 1947, the next day after the complete work stoppage on Monday, October 6, 1947.

16. Under all the circumstances did petitioner take timely action, that is, did petitioner take disciplinary action against Adair, Wilson, Adams and Kinser within a reasonable time after it had knowledge of their respective acts of misconduct.

17. Does the Act change or nullify the common law principle that when an employer continues to accept the services of an employee after knowledge that such employee has breached his contract of employ-

ment, *there is a prima facie condonation of the offense only in the absence of any explanation.*

18. Does the Act change or nullify the common law principle that an employer, after ascertaining that an employee has breached his contract of employment, has a reasonable time in which to investigate and fully satisfy himself as to the guilt of such employee before taking any disciplinary action—in other words, waiting a reasonable time before acting will not amount to a waiver of the employers right to discipline or a condonation of the offense committed by the employee.

19. Does the Act change or nullify the common law principle that even when an employer continues to accept the services of an employee after knowledge that such employee has breached his contract of employment, such does not, as a matter of law, establish a waiver of the employer's right to discipline such employee.

20. Does the Act change or nullify the common law principle that an employer who continues to accept the services of an employee after knowledge that such employee has breached his contract of employment is presumed to have waived such breach *only in the absence of reasonable cause for delay in discharging such employee.*

21. Did petitioner intend to relinquish its right to discipline those responsible for the complete work stoppage.

22. Whether, as a matter of law, petitioner discharged each of the four individual complainants, namely, Adair, Wilson, Adams and Kinser, for legal cause within the meaning of Section 10 (c) of the Act.

23. Whether, as a matter of law, it was proper to find, conclude, hold or decree that the knowledge of certain of petitioner's foremen was, as a matter of law attributable to the petitioner.

24. Whether the finding, conclusion, holding or decree that petitioner was required to reserve to itself the privilege of disciplining any participant in the work stoppage before permitting its employees to return to work the day following the complete work stoppage on Monday, October 6, 1947, in order to later discipline any participant in the said work stoppage is an improper interference by the Board with petitioner's discretion in the management of its business.

25. Whether, as a matter of law, an employer is required, before permitting any of his striking employees to return to work, to reserve to himself the right to discipline the participants therein, in order to later discipline any such employee.

26. Whether, as required by the declared policy of the Act, the decree of the Court below, protects commerce from interruption by encouraging the practice and procedure of collective bargaining.

27. Whether the decree of the Court below permits the Board to interfere with petitioner's right to manage its business in keeping with its own decision.

28. Whether the decree of the Court below is erroneously based on the assumption that the conduct of Adair, Wilson, Adams and Kinser constituted concerted activities protected by the Act.

29. Whether there is substantial evidence on the record considered as a whole to support the holding that the reinstatement of Adair, Wilson, Adams and Kinser with pay is necessary to effectuate the purposes of the Act.

30. Whether the decree of the Court below permits the Board to alter its earlier position expressed *In The Matter of NATIONAL ELECTRIC PRODUCTS CORP.*, decided December 1, 1948, 80 N. L. R. B. 995, and thereby bring about through its administration of the Act harsh, unjust, unreasonable inequities.

4.

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT.

The United States Court of Appeals for the Fifth Circuit, without writing an opinion, has decided novel, unsettled and important questions of federal law involving the construction of sections recently added to the *National Labor Relations Act* by the *Labor Management Relations Act, 1947*, which have not been, but should be settled by this Court. An early authoritative decision of these questions by this Court is of pressing importance, not only to the petitioner but also to employers, employees and labor organizations throughout the United States of Amer-

ica, and as well to the National Labor Relations Board.

To the extent that the decree of the Court below sustains the position of the Board with respect to the legal principles of condonation or waiver it is not in accord with the following authorities:

Johnson v. Zerbst, 304 U. S. 458, 58 S. Ct. 1019, 82 L. Ed. 1461, 146 A. L. R. 357.

Compania Constructora Bechtel-McCone, S. A. v. McDonald, 9 C. C. A., 1946, 157 F. 2d. 749.

N. L. R. B. v. Dorsey Trailers, Inc., 179 F. 2d. 589.

In re Nagel, 2 C. C. A., 1921, 278 F. 105.

Rosbach v. Sackett & W. Co., 1909, 134 App. Div. 130, 118 N. Y. Supp. 846.

Goold v. Singh, 88 Cal. App. 339, 263 P. 548.

Champion Sparkplug Co. v. Automobile Sundries Co., 2 C. C. A., 1921, 273 F. 74.

Troy Fertilizer Co. v. Logan, 90 Ala. 325, 8 So. 46.

Gordon v. Dickinson, 100 W. Va. 490, 130 S. E. 65, 44 A. L. R. 526.

Fitzpatrick Square Bale Ginning Co. v. McLaney, 153 Ala. 586, 44 So. 1023.

Jonas v. Field, 83 Ala. 445, 3 So. 893.

In the Matter of National Electric Products Corp., decided December 1, 1948, 80 N. L. R. B. 995.

39 C. J., Sec. 89 (3), p. 88.

56 C. J. S., Sec. 43, p. 433, et seq.

35 Am. Jur., Sec. 50, p. 481, et seq.

18 R. C. L., Sec. 27, p. 517.

Dawson Farmers Elevator Co. v. Opp., 57 N. D. 598, 223 N. W. 350.

Prior to the decree of the Court below the Board had ruled upon the same factual issues and gave an opinion which would have resulted in a decision favorable to the petitioner had such earlier decision been followed or applied by the Board in the first instance. *In The Matter of National Electric Products Corp.*, decided December 1, 1948, 80 N. L. R. B., 995. The decree of the Court below confuses the administrative position of the Board and results in uncertainty for all interested parties and fails to establish any new rules of law for the guidance of employers, employees, or labor organizations. The decree of the Court below has brought chaos. It is now urgent that the Supreme Court settle such issues.

There is a conflict between the decree of the Court below and the position taken by the Board *In The Matter of National Electric Products Corp.*, decided December 1, 1948, 80 N. L. R. B., 995, as to what will best effectuate the purposes of the Act in such a case as is here before this Court, and the said decree of the Court below is not in accord with the designated policy of the Act as expressed in:

N. L. R. B. v. Norfolk Southern Bus Corp., C. C. A. 4, 1946, 159 F. 2d. 516, certiorari denied 67 S. Ct. 1085, 330 U. S. 844, 91 L. Ed. 1290.

N. L. R. B. v. Flotill Products, C. A. 9, 1950, 180 F. 2d. 441.

To the extent that the decree of the Court below permits the Board to declare authoritatively that an employer must make reservations or qualifications re-

serving his right to discipline employees before saying that such employees may return to work constitutes an improper interference by the Board with the right of an employer to conduct its business in keeping with its own discretion, and is in conflict with the following decisions:

N. L. R. B. v. Jones & Laughlin Steel Corp., 1937, 81 L. Ed. 893, 916, 301 U. S. 22, 45-46.

N. L. R. B. v. Fansteel Metallurgical Corp., 306 U. S. 240, 8 L. Ed. 627, 123 A. L. R. 599.

N. L. R. B. v. Union Pacific Stages, 9 C. C. A., 1938, 99 F. 2d. 153.

Standard Life & Stone Co. v. N. L. R. B., 4 C. C. A., 1938, 97 F. 2d. 531.

N. L. R. B. v. Robbins Tire & Rubber Co., Inc., 5 C. C. A., 1947, 161 F. 2d. 302.

Wyman-Gordon Co. v. N. L. R. B., 8 C. C. A., 153 F. 2d. 480.

N. L. R. B. v. Montgomery Ward & Co., Inc., 8 C. C. A., 157 F. 2d. 486.

To the extent that the decree of the Court below holds that petitioner did not for good cause discharge Adair, Wilson, Adams and Kinser it is in conflict with the following:

Associated Press v. N. L. R. B., 301 U. S. 103, 132, 81 L. Ed. 953.

In re Underwood Machine Co., 74 N. L. R. B. No. 126.

N. L. R. B. v. Clarksburg Publishing Co., 4 C. C. A. 120 F. 2d. 976.

N. L. R. B. v. Robbins Tire & Rubber Co., Inc., 5 C. C. A. 1947, 161 F. 2d. 798.

N. L. R. B. v. Continental Pipeline Co., 5 C. C. A., 1947, 161 F. 2d. 302.

N. L. R. B. v. Fulton Bag & Cotton Mills, 5 C. A. 1949, 175 F. d. 675.

To the extent that the decree of the Court below holds that the conduct of Adair, Wilson, Adams and Kinser constituted federally protected concerted activities within the meaning of the Act, it is contrary to the provisions of Sections 7 of the Act as is shown by H. R., Rep. No. 510, 80th Cong., 1st Sess., p. 38 a part of which is quoted in footnote 15 in *International Union, U. A. W., A. F. L., Local 232 v. Wisconsin Employment Relations Board, et al.*, 69 S. Ct. 516, decided February 28, 1949.

Wherefore your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the United States Court of Appeals for the Fifth Circuit, commanding that Court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a transcript of the record and proceedings herein; and that the decree of the United States Court of Appeals for the Fifth Circuit, be reversed by this Honorable Court, and your petitioner have such other and further relief in the premises as to this Honorable Court may seem meet and just.

Respectfully submitted,

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